BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is found in the record at pages 22 to 26. It has not yet been reported.

II

JURISDICTION.

A statement concerning jurisdiction appears under B on page 4 of the petition. The judgment of the Circuit Court of Appeals reversing the judgment of the District Court of the United States for the Southern District of Indiana was rendered February 18, 1944. (R. 27.) No petition for rehearing was filed.

III

STATEMENT OF THE CASE

A statement of the case containing all matters material to a consideration of the questions presented by the petition, with appropriate page references to the printed record, appears under "Summary Statement of the Matter Involved" on Page 1 of the petition.

IV

SPECIFICATION OF ERROR

A specification of the error relied on is contained in the petition under the heading "Statement of Reasons Relied

On for Allowance of the Writ." The Circuit Court of Appeals erred in reversing the judgment of the District Court of the United States for the Southern District of Indiana, Indianapolis Division, which judgment was in favor of Petitioner.

V

SUMMARY OF ARGUMENT

The decision of the Seventh Circuit Court of Appeals is in direct conflict with *Holmes v. Rowe* (C. C. A. 9), 97 F(2d) 537, and with the basic reasoning of this court in *Local Loan Co. v. Hunt,* 292 U. S. 234, 78 LEd. 1230.

The decision in *Holmes v. Rowe, supra,* is not based on fraud and the Seventh Circuit Court of Appeals was in error in purporting to distinguish said case on that ground.

Jurisdiction should be exercised in cases of this character according to the exigencies of the case.

The primary consideration is whether unusual circumstances exist and not whether the case involves fraud, duress, coercion or other similar grounds of relief in equity. Each case depends on its own particular facts and the exercise of authority by the bankruptcy court is discretionary. The facts and circumstances in the case at bar are sufficiently unusual to warrant the exercise of the District Court's discretion in favor of petitioner and the reversal thereof by the Circuit Court of Appeals is unwarranted.

An important question of federal law is involved, which has not been and should be settled by this court.

ARGUMENT

The decision of the Seventh Circuit Court of Appeals is in direct conflict with *Holmes v. Rowe* (C.C.A. 9), 97 F(2d) 537, and is also in conflict with the basic reasoning of this court in *Local Loan Co. v. Hunt*, 292 U. S. 234, 239, 240, 78 LEd. 1230, which was followed in *Holmes v. Rowe, supra.* The facts in the latter case were identical with this case as to (1) the filing of a petition in bankruptcy and discharge of the petitioner scheduling a debt sued on in a pending action (in this case the schedule also specifically described the pending action); (2) the failure to appear in the state court and set up the bankruptcy discharge or to obtain an order in the bankruptcy court during the pendency of the bankruptcy proceeding, staying the state court action; (3) the taking of a default judgment in the state court subsequent to the discharge; (4) the subsequent application to the bankruptcy court for relief by supplemental petition. *Holmes v. Rowe, supra,* holds the action of the District Court in granting relief proper. The Seventh Circuit Court of Appeals in this case holds the contrary.

The opinion in this case seeks to distinguish *Holmes v. Rowe, supra,* on the sole ground that the opinion in that case states that prior to the filing of the bankruptcy petition the state court plaintiff had stated to the debtor that a judgment had already been taken, which was not the fact. It concludes, therefore, that the Ninth Circuit Court of Appeals was granting relief on the ground of fraud, not present in this case. The opinion in *Holmes v. Rowe,* however, is rested on no such ground. Fraud is not even referred to. The Court quoted from *Seaboard Small Loan Corporation v. Ottinger* (C.C.A. 4), 50 F(2d) 856, cited by this court in *Local Loan Co. v. Hunt, supra,* as follows:

> "The fundamental question involved is the effect of the discharge in bankruptcy upon the debt. * * * The question may be decided by either state or federal court according to state law, but the bankruptcy court has primary and superior jurisdiction to determine the effect of its own decree of discharge, and it may exercise, or refuse to exercise, that jurisdiction *according to the exigencies of the case.*" (All italics ours unless otherwise indicated.)

In *Local Loan Co. v. Hunt,* 292 U. S. 234, 241, this court first holding that the bankruptcy court has authority to entertain a proceeding of this character, determine the effect of the adjudication and order, and enjoin the creditor from a threatened interference therewith, said that the court was not bound to exercise its authority and that "* * * it probably would not and should not have done so except under *unusual circumstances* * * *."

In limiting the exercise of the authority to cases involving fraud, duress, coercion or other similar grounds of relief in equity the Circuit Court of Appeals has unduly limited the consideration of "the exigencies of the case" and "unusual circumstances" and in holding the petitioner barred from relief on account of negligence has failed to take into account the realities of the situation. It is conceded in the opinion that an order could have been entered in the bankruptcy proceeding staying the state court proceeding had any necessity for such an order appeared. The result is to give to the apparently acquiescent creditor an advantage over the one who indicates that he will press his claim notwithstanding the bankruptcy proceeding.

The Fourth Circuit Court of Appeals had occasion to consider a somewhat similar case in *Helms v. Holmes,* 129 F(2d) 263. In that case, however, the state court action

was commenced *after* the discharge in bankruptcy. Obviously the bankrupt is in a somewhat different situation when notified in some manner that a judgment is to be sought notwithstanding the discharge. The Fourth Circuit Court of Appeals cites and quotes from *Holmes v. Rowe, supra,* and states the rule to be that "whether the bankruptcy court should exercise such discretionary authority is a matter to be determined from the peculiar facts of the particular case."

While relief was denied in the majority opinion on the ground that the circumstances were not sufficiently unusual, the court did not restrict relief to cases involving fraud, duress, coercion and like circumstances nor hold as a rigid matter of law that the failure to appear in the state court constitutes such negligence as to bar relief. In fact, although the opposite result was reached, *Helms v. Holmes, supra,* is stated in Vol. 1, 1943 Cumulative Supplement, Collier on Bankruptcy (14th ed.), p. 59, note 52, to be a recent affirmation of *Holmes v. Rowe, supra.*

In the dissenting opinion in *Helms v. Holmes, supra, Holmes v. Rowe, supra,* is cited as contrary to the result reached by the majority. Neither opinion indicates that the latter case was thought to rest on fraud. The following language of the dissenting opinion is pertinent here:

> "But the right to enjoin being established, the circumstances under which it may be exercised are not confined to any definite and limited state of facts. The reported cases show a tendency to enlarge rather than to restrict its use. In my opinion this tendency is a wise and humane one and necessary to prevent nullification of the beneficient purposes of the bankrupt law at the hands of ingenious and grasping creditors. Certainly the right

to an injunction is not barred merely because the bankrupt might have fought the matter out in the state court. Local Loan Co. v. Hunt decided this. And seemingly it is not barred in all cases merely because the bankrupt has failed to assert his defenses in the court where he has been sued. * * *

There is universal and settled recognition that, as stated in *Williams v. United States Fidelity & Guaranty Co.*, 236 U.S. 549, 554, 35 S.Ct. 289, 290, 59 LEd. 713:

'It is the purpose of the bankrupt act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'

Bearing in mind the above purpose, it seems clear that there is imposed on the bankruptcy court the responsibility and the right to exercise its powers to insure that the purpose is really accomplished. While the necessities which have led to the issuance of injunctions against creditors who ignore the bankruptcy of their debtors have created a steadily growing tendency to extend the use of this form of relief, I do not think we need go beyond the scope and precedent of the decided cases in order to justify its exercise here; and this even if we limit its use to the "unusual" cases to which reference is made. * * *

Taking it to be a fact that the bankrupt did not know that a judgment was being or would be sought against him and that he had reasonable grounds to believe that no judgment would or could be taken against him, the conclusions in the majority opinion lose much of their force so far as they are predicated on the theory that this is merely a

case where a bankrupt negligently failed to offer a defense at the proper time. I am unable to see that a man is guilty of "gross negligence" in failing to defend a suit when he does not know that any claim is being asserted against him and has reasonable grounds to believe that none is being asserted. * * *

And because the district judge was in position to know the surrounding circumstances and to sense the atmosphere of this whole matter better than this court can, I would be unwilling to interfere with the exercise of his judgment unless convinced that it was plainly unsound. On the contrary, I am of opinion that the granting of the injunction was clearly right and was necessary to prevent a gross injustice. The purpose of the bankruptcy law to offer insolvent debtors a further chance would mean nothing if this debtor who once turned over his property to his creditors and started anew should have the little property which he has accumulated since snatched away from him by a judgment surreptitiously obtained seven years ago, of the existence of which he never knew, and which represents a debt from which he was discharged. * * *

Neither the time when the suit is brought nor the time when the judgment is obtained is determinative of any legal principle. If a court of bankruptcy can, as in Re Cleapor, enjoin a creditor from bringing suit, after the bankrupt has been discharged, in an attempt to obtain judgment in spite of the discharge, there would seem no reason why it could not equally enjoin the creditor from enforcement of the judgment if he obtained it. The character of the liability is not altered by being reduced to judgment. *Badger v. Jordan Marsh Co., supra.* The question is one of the equitable powers of the court to give force and effect to its decrees and to protect the bankrupt in the enjoyment of the rights given him by

> the law, and is to be determined by the principles of equity. * * *
>
> The very basis on which Local Loan Co. v. Hunt and the other cited cases were decided was that the bankrupt had a right to appeal for protection to the court whose decree had determined his rights and need not to be left to the uncertainties of seeking relief elsewhere."

It will be noted that in denying the application of *Local Loan Co. v. Hunt,* 292 U.S. 234, to this case, the court stated:

> "That had to do with the validity of an injunction, approved by this court in 67 F(2d) 998, restraining *during bankruptcy,* the institution and prosecution of suits based upon assignments of wages. There, there was in fact an application for a restraining order against the prosecution of the suits, as there might have been in this case."

It is clear from even a cursory examination of this Court's opinion in *Local Loan Co. v. Hunt* that no question of restraining a suit *during bankruptcy* was involved. The action enjoined was commenced after a discharge in bankruptcy and the debtor was advised thereby that the creditor was proceeding in spite of the discharge. Had such notice been given here the situation would have been entirely different.

In the opinion in this case no consideration is given to the question of unusual circumstances except that the various dates are stated when steps were taken. Even these are sufficient to demonstrate the fallacy of the description of the state court proceeding as one where the court was "proceeding in its normal functions to enforce

a legitimate demand." It is scarcely normal for a period of four and a half years to intervene between the service of process in a pending action and the taking of a default judgment.

It is submitted that under the foregoing authorities the sole issue was whether the circumstances were sufficiently unusual to warrant the exercise of the District Court's discretion. In determining such issue that Court had the right to consider:

1. The fact that petitioner not only scheduled the debt but described the pending action therein.
2. That she believed that the discharge relieved her of the necessity of doing anything further in the pending action.
3. That she left the state six months after her discharge, no action having been taken by the special representative in the meantime.
4. That the plaintiff in the pending action was not a private litigant but a representative of a department of the State of Indiana.
5. That petitioner was only one of a number of defendants in said cause.
6. That said special representative knew of said discharge and took no action in said cause until more than three years after petitioner had left the state.
7. That no action was taken by said special representative to enforce said judgment prior to the sale of all assets remaining in his hands to respondent for a nominal consideration more than two and one-half years after said judgment was taken.

8. That petitioner did not learn of said judgment or said sale until nearly three years after said judgment was rendered.

9. That under the applicable Indiana statute petitioner's remedy for relief from a judgment taken by mistake, inadvertence, surprise, or excusable neglect was limited to two years from the date of the judgment. (Sec. 1068, Burns' Ind. Stat. Ann. 1933; Acts 1881 (Spec. Sess.), Ch. 38, Sec. 135, p. 240; 1921, Ch. 115, Sec. 1, p. 277; appendix post.)

Each of the grounds asserted by petitioner for allowance of the writ exists in this case. The decision is in conflict with the decision of another Circuit Court of Appeals on the same matter; is in probable conflict with a decision of this Court; and an important question of federal law is involved which has not been and should be settled by this Court. The petition should be granted, the judgment of the Circuit Court of Appeals should be reversed, and the judgment of the District Court should be affirmed.

Respectfully submitted,

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